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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 169

WILLIAM BUCHSBAUM, *Petitioner,*

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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INDEX.

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2-3
Statutes Involved	3
Statement	4-6
Specification of Errors to be Urged	6-7
Reasons for Granting the Writ	7-11
Conclusion	12

CITATIONS.

CASES:

Arkadelphia Milling Co. v. St. Louis Southwestern Railway Co., 249 U. S. 134	7
Burnham v. Commissioner, 86 F. (2d) 776, cert. den., 300 U. S. 683	10
Commissioner v. Freund, 98 F. (2d) 201	10
Commissioner v. Kitselman, 89 F. (2d) 458, cert. den., 302 U. S. 709	10
Commissioner v. Newberry Lumber & Chemical Co., 94 F. (2d) 447	10
Commissioner v. Tyng and Buchsbaum, 106 F. (2d) 55	10
Gwinner v. Heiner, 25 F. Supp. 659	6
Helvering v. Gowran, 302 U. S. 238	8
Helvering v. Tex-Penn Oil Co., 300 U. S. 481	5
Helvering v. Tyng, 308 U. S. 527	4
Helvering v. Watts, 296 U. S. 387	9
Houston v. Commissioner, 53 F. (2d) 445	7
Kaspare Cohn Co., Ltd., 35 B. T. A. 646	10
Morris D. Kopple, 35 B. T. A. 1056	6
Langnes v. Green, 282 U. S. 531	8
Frederick L. Leckie, 37 B. T. A. 252	10
LeTulle v. Scofield, 308 U. S. 415	2, 6, 7, 8, 10

Page

Lilienthal v. Commissioner, 80 F. (2d) 411 10
In Re City of Louisville, 231 U. S. 639 7
Propper v. Commissioner, 89 F. (2d) 617 6
In Re Sanford Fork & Tool Co., 160 U. S. 247 ..... 7, 8
Scofield v. LeTulle, 103 F. (2d) 20 10
Karl B. Segall, 38 B. T. A. 43 10
Sprague v. Ticonic National Bank, 307 U. S. 161 8
Ticonic National Bank v. Sprague, 303 U. S. 406..... 8
Underwood v. Commissioner, 56 F. (2d) 67 10
Virginia-Lincoln Furniture Corpn. v. Commissioner, 56 F. (2d) 1028 11
White v. United States, 22 F. Supp. 821 10

STATUTES.

Judicial Code, Section 240(a), as amended by Act of February 13, 1925 2

Revenue Act of 1926,
Sec. 1003(b) 3, 8

Revenue Act of 1928,
Sec. 112 7
Sec. 112(i)(1) 3

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Your petitioner, William Buchsbaum, prays that a writ of certiorari issue to review the judgment and order of the United States Circuit Court of Appeals for the Second Circuit entered in this cause on March 20, 1940 (R. 450), denying petitioner's motion, filed in said court, to affirm the decision of the Board of Tax Appeals that taxable gain was not derived from the receipt of debentures and, alternatively, to remand to the Board with instructions to determine whether or not the debentures had an ascertainable market value when received by petitioner.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals (R. 35-61) is reported in 36 B. T. A. 21. The opinion of the Circuit Court of Appeals (R. 408-418) on the first appeal of the case to that court is reported in 106 F. (2d) 55. The opinion of the Supreme Court (R. 419) delivered when the case was previously before this Court is reported in 308 U. S. 527. On remand to the Circuit Court of Appeals for the Second Circuit, that court did not deliver an opinion in this case. However, an opinion was delivered in the companion case of *Lucien H. Tyng* v. *Commissioner of Internal Revenue* (R. 405 in that case), now pending in this Court on petition for certiorari, No. 148, October Term, 1940.

JURISDICTION.

The judgment and order of the Circuit Court of Appeals, in respect of which this petition for certiorari is filed, was entered on March 20, 1940 (R. 450). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

Whether in reversing and remanding for further proceedings the previous decision of the Circuit Court of Appeals in this case to the effect that no gain or loss was recognized on the receipt by petitioner of the debentures here involved, this Court intended to foreclose the petitioner from raising in the court below the question whether the debentures, which by their terms were convertible into stock of the issuing corporation, gave petitioner a "proprietary" stake in the enterprise, as required by the rule laid down in *LeTulle* v. *Scofield*, 308 U. S. 415 (1940).

Whether, the case having been remanded for further proceedings, petitioner had the right to raise in the court below as a ground for affirming the decision of the United States Board of Tax Appeals the fact, shown by the rec-

ord, that the sale of the debentures was restricted and that they had no ascertainable market value when received by petitioner, this question not having been passed on by this Court when the case was previously before it.

Whether the court below, in order to prevent a miscarriage of justice, should not, at least, have remanded the case to the Board of Tax Appeals with instructions to determine whether or not the debentures had an ascertainable market value when received by petitioner, and to permit the introduction of testimony and evidence bearing on the issue of ascertainable market value, and to take appropriate action thereupon.

STATUTES INVOLVED.

Section 112(i)(1), Revenue Act of 1928:

> "(i) Definition of reorganization.—As used in this section and sections 113 and 115—
>
> (1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected."

Section 1003(b), Revenue Act of 1926:

> "(b) Upon such review [of Board of Tax Appeals proceedings by Circuit Courts of Appeals], such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require."

STATEMENT.

On January 2, 1940, this Court delivered the following judgment in the instant case and the case of *Helvering* v. *Tyng:*

> "*Per curiam:* The petitions for writs of certiorari are granted. The judgments are reversed and the causes are remanded to the Circuit Court of Appeals for further proceedings. *LeTulle* v. *Scofield,* No. 63, this day decided." (R. 419)

On January 22, 1940, petitioner Buchsbaum filed a Petition for Rehearing with this Court. His petition was denied on January 29, 1940, and the case was sent back to the Circuit Court of Appeals on mandate to take further proceedings (R. 420).

The instant case was never briefed in this Court on the merits, but only in opposition to the Government's petition for certiorari and by way of petition for a rehearing. It was never heard or set for argument on its merits by this Court, so that when the case reached the Circuit Court of Appeals on remand, the petitioner took the position that the reversal and remand for further proceedings left the lower court free to consider the case fully on its facts (R. 423-436).

As shown by what the court below wrote in the *Tyng* case (considered with this one),* that court felt that the reversal of this case was in effect a direction to decide for the Commissioner. The court below wrote:

> "The taxpayer asks us in effect to disregard the action taken by the Supreme Court, upon the theory that the transfer was a reorganization within the stat-

*On April 6, 1940, Judge Learned Hand wrote in reply to a letter to him written April 5 by counsel for Buchsbaum: "It seems to me incredible that there should be any doubt that what we said in *Commissioner* v. *Tyng* applies to *Commissioner* v. *Buchsbaum.* In order to make any further change, I shall have to communicate with Judge Chase and Judge Clark, both of whom are out of the city. Under all the circumstances, this seems to me unnecessary."

ute for other reasons than those discussed in *LeTulle* v. *Scofield*, 308 U. S. 415. We do not so read the mandate; to do so would be in effect to hold that the decision was upon a point of law not necessarily involved in the reversal of our judgment. For obvious reasons we cannot assume anything of the sort, unless the Supreme Court itself so decides. If the taxpayer wishes such a declaration, he must apply to that court, not to this." (R. 405 in *Tyng* case, now pending in this Court on petition for certiorari, No. 148, October Term, 1940.)

In this case, Buchsbaum exchanged stock in two corporations for debentures of the acquiring corporation plus cash. The debentures which petitioner received were convertible into Class A stock of the issuing corporation (R. 342). The convertible feature was written into the debentures themselves (R. 338-342), and gave the holder the absolute right, if exercised during a certain period, to exchange them for stock.

Under the contract with the issuing corporation by which petitioner obtained the debentures early in 1929, the sale of any of them was prohibited until January 1, 1930, and until January 1, 1931, if any of the debentures should be offered for sale in a lot exceeding $50,000 in principal amount, petitioner was required first to offer them to the issuing corporation at one point below the market on the day preceding the offer (R. 315). Further, the issuing corporation had the option under this contract of waiting for as long a period as forty-five days to determine whether or not it would accept the offer (R. 315). It is obvious that within such a period the market might have declined to a point where the issuing corporation would elect not to take the debentures. Nevertheless, during such period the petitioner could not dispose of them.

Under the applicable decisions, a restriction on sale, such as the one in the instant case, prevents the security from having an ascertainable market value and a finding of value can not be sustained. *Helvering* v. *Tex-Penn Oil Co.*, 300

U. S. 481, 499 (1937); *Propper* v. *Commissioner*, 89 F. (2d) 617 (C. C. A. 2d, 1937); *Gwinner* v. *Heiner*, 25 F. Supp. 659 (D. C., W. Dist., Pa., 1938); *Morris D. Kopple*, 35 B. T. A. 1056 (1937).

Petitioner contends that inasmuch as the debentures had no ascertainable market value, they cannot properly be the basis for the imposition of income tax and that it matters not whether they were or were not received in connection with a "reorganization".

Under the authorities cited hereinafter, a respondent or an appellee (petitioner here) may urge in support of the judgment of the tribunal below, any matter appearing in the record. The decision of the Board of Tax Appeals, being supportable on this ground which is shown by the record, should have been affirmed by the court below or, at least, the court below should have remanded the case to the Board with instructions to determine whether or not the debentures had an ascertainable market value when received by petitioner and to permit the introduction of testimony and other evidence bearing on that issue.

SPECIFICATION OF ERRORS TO BE URGED.

1. The Circuit Court of Appeals erred in denying petitioner's motion (R. 427) to affirm the decision of the United States Board of Tax Appeals that petitioner derived no taxable gain from the receipt of the convertible debentures here involved (1) because by reason of the convertibility feature of the debentures, petitioner retained a proprietary stake in the enterprise as required by the rule laid down in *LeTulle* v. *Scofield*, 308 U. S. 415 (1940) and (2) because in any event the record shows that the sale of the debentures was restricted and that they had no ascertainable market value when received by petitioner.

2. The Circuit Court of Appeals erred in denying petitioner's alternative motion (R. 428) that the court remand the case to the Board of Tax Appeals with instructions to

determine whether or not the debentures had an ascertainable market value when received by petitioner and to permit the introduction of testimony and other evidence bearing on the issue of ascertainable market value, and to take appropriate action thereupon.

REASONS FOR GRANTING THE WRIT.

1. It is necessary that this Court should decide whether or not debentures which are convertible into stock of the issuing corporation give the holder a proprietary stake in the enterprise within the purview of Section 112 of the Revenue Act of 1928,—a question apparently left open for decision in the only opinion delivered by this Court on these issues in the case of *LeTulle* v. *Scofield*, 308 U. S. 415 (1940). This is an important question of law.

2. The refusal of the court below to go into the question whether the debentures had an ascertainable market value and its refusal to remand the case to the Board of Tax Appeals with instructions to determine whether or not the debentures had an ascertainable market value when received by petitioner, is in conflict with the controlling decisions of this Court in many cases, discussed below.

It is well settled by the decisions of this Court that, under a mandate from this Court directing further proceedings, as was the case here, the court below has the same power, except as regards questions decided by the Supreme Court, which it had when the case was first before it.

> "The mandate of the Supreme Court restored to this court the power which it had when the case was first here, other than the questions which it decided." *Houston* v. *Commissioner*, 53 F. (2d) 445, 447 (C. C. A., 3rd, 1931). See also *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 256 (1895); *In re City of Louisville*, 231 U. S. 639, 645 (1914); *Arkadelphia Milling Co.* v. *St. Louis Southwestern Railway Co.*, 249 U. S. 134, 143 (1919).

In the recent case of *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 168 (1939), this Court approved its position as set forth in the case of *In re Sanford Fork & Tool Co.*, *supra*, and stated:

> "While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues."

In the *Sanford Fork & Tool* case, this Court said (at p. 258 of 160 U. S.):

> "The case being thus left open, by the opinion and mandate of this Court, and by the general rules of practice in equity, for further proceeedings, with a right in the plaintiffs to file a replication, putting the cause at issue, the Circuit Court might, in its discretion, allow amendments of the pleadings for the purpose of more fully or clearly presenting the facts at issue between the parties."

By Section 1003(b), Revenue Act of 1926, governing the review of Board of Tax Appeals proceedings, it is directed that upon such review the appellate court—

> "* * * shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, *as justice may require.*"

Also it is well settled that, as stated by this Court in *LeTulle* v. *Scofield*, 308 U. S. 415 (1940), "A respondent or an appellee [petitioner here] may urge any matter appearing in the record in support of a judgment." See also *Langnes* v. *Green*, 282 U. S. 531, 535-537 (1931); *Helvering* v. *Gowran*, 302 U. S. 238, 245 (1937); *Ticonic National Bank* v. *Sprague*, 303 U. S. 406, 410, Note 3 (1938).

In view of the authorities cited above, the lower court had full power either to affirm on the record or to remand on the issue of ascertainable market value, and its power in this

respect should have been exercised under the terms of the mandate of this Court. As previously stated, the court below did not deny petitioner's motion to remand, by the exercise of its discretion. Rather it refused altogether to go into the matter, taking the view that such action, on its part, was foreclosed by reason of the action of this Court in the case.

We submit that justice will not be done unless (1) the issue of ascertainable market value is decided favorably to petitioner on the present record, or (2) he is given an opportunity to offer further proof in the Board of Tax Appeals that the debentures had no ascertainable market value.

The fundamental question in this case is the amount of petitioner's taxable gain. If it is a fact that the debentures had no ascertainable market value, they cannot be the basis for the calculation of gain, whether or not there was a "reorganization". If there was no ascertainable gain to petitioner, then justice will not be done if he is taxed as if there were an ascertainable gain.

As stated above, the record shows that the debentures could not have been sold, and the case in the court below, we submit, should have been considered on that record.

Surely, also, if there is any question as to whether the correct result on the whole case can be ascertained from the present record, this Court should not permit a final closing of the case without giving petitioner an opportunity to produce additional evidence, if necessary.

A question may be raised as to why petitioner did not contend, when the case was tried in the Board, that the debentures had no ascertainable market value. When the case was tried (June 24, 1936; see R. 2), *Helvering* v. *Watts*, 296 U. S. 387, had been decided by this Court (December 16, 1935). Under that case and under the settled administrative practice therein approved, it was generally agreed that in a situation such as here presents itself, the reorganization provisions applied and no gain was to be recognized in respect of the debentures which petitioner received.

Therefore, there was no apparent occasion for introducing the secondary issue based on the nonsalability of these debentures. That such an assumption was a reasonable one at that time is supported by the fact that, prior to the decision of this Court in *LeTulle* v. *Scofield*, the unanimous conclusions of six different Circuit Courts of Appeal, the United States Court of Claims and the United States Board of Tax Appeals as well, had been that the receipt of nonstock "securities" resulted in the retention of the continuity of interest necessary for a reorganization. *Commissioner* v. *Tyng and Buchsbaum*, 106 F. (2d) 55 (1939), the instant case; *Commissioner* v. *Freund*, 98 F. (2d) 201 (C. C. A. 3d, 1938); *Scofield* v. *LeTulle*, 103 F. (2d) 20 (C. C. A. 5th, 1939), the case which was reversed by the Supreme Court; *Commissioner* v. *Newberry Lumber & Chemical Co.*, 94 F. (2d) 447 (C. C. A. 6th, 1938); *Commissioner* v. *Kitselman*, 89 F. (2d) 458 (C. C. A. 7th, 1937), cert. den., 302 U. S. 709 (1937); *Burnham* v. *Commissioner*, 86 F. (2d) 776 (C. C. A. 7th, 1936), cert. den., 300 U. S. 683 (1937); *Lilienthal* v. *Commissioner*, 80 F. (2d) 411 (C. C. A. 9th, 1935); *White* v. *United States*, 22 F. Supp. 821 (Ct. Cls., 1938); *Kaspare Cohn Co., Ltd.*, 35 B. T. A. 646 (1937); *Frederick L. Leckie*, 37 B. T. A. 252 (1938); *Karl B. Segall*, 38 B. T. A. 43 (1938).

3. The action of the court below in denying petitioner's alternative motion to remand the case to the Board of Tax Appeals for a determination whether the debentures had an ascertainable market value is in conflict with the well-established rule that if a case has been tried on the wrong theory or if the record is not in condition for the appellate court to decide a question presented with justice to all parties concerned, the appellate court has the power, without determining or disposing of the case, to remand it to the lower tribunal for further proceedings. See *Underwood* v. *Commissioner*, 56 F. (2d) 67, 73 (C. C. A. 4th, 1932), and cases there cited.

The following excerpt from the opinion in *Virginia-Lincoln Furniture Corpn.* v. *Commissioner*, 56 F. (2d) 1028 (C. C. A. 4th, 1932), covers the situation (p. 1033):

> " * * * we will not turn him [the taxpayer] out of court because he may have misconceived his remedy. As we have said before, courts exist to do justice, not to furnish a forum for the technical skill of counsel. In reviewing a decision of the Board, we are given broad powers to affirm, modify, or reverse it 'as justice may require' * * * ; and we do not think that justice requires that a petitioner with a meritorious case be turned out of court upon any such technical ground."

In the court below petitioner filed affidavits of two witnesses he proposes to call in the event the case is remanded to the Board for a determination whether the restricted debentures had an ascertainable market value. As will be seen from one of these affidavits (R. 437-439), the facts are that the restrictions on sale were inserted in the agreement of February 11, 1929 (R. 315) at the insistence of the issuing corporation for the purpose of protecting its credit position, and not at the instance of petitioner or any of the other persons who exchanged stocks for these restricted securities.

The record shows that securities in the neighborhood of $15,000,000 face value were involved in the 1929 transaction (R. 40), and as they were closely held, it is evident that, without the restrictions on sale, the holders would have been in a position seriously to interfere with the financial operations of the company by dumping large amounts of these securities on the market.

Another affidavit (R. 439-440) shows that by December 31, 1930, when the restrictions on these debentures ended, unrestricted debentures of this issue had dropped over thirty-three points to 59¾, which was the low price of sales on that date.

CONCLUSION.

Wherefore, it is respectfully submitted that this petitio
for a writ of certiorari to review the judgment of the Ci
cuit Court of Appeals for the Second Circuit should b
granted.

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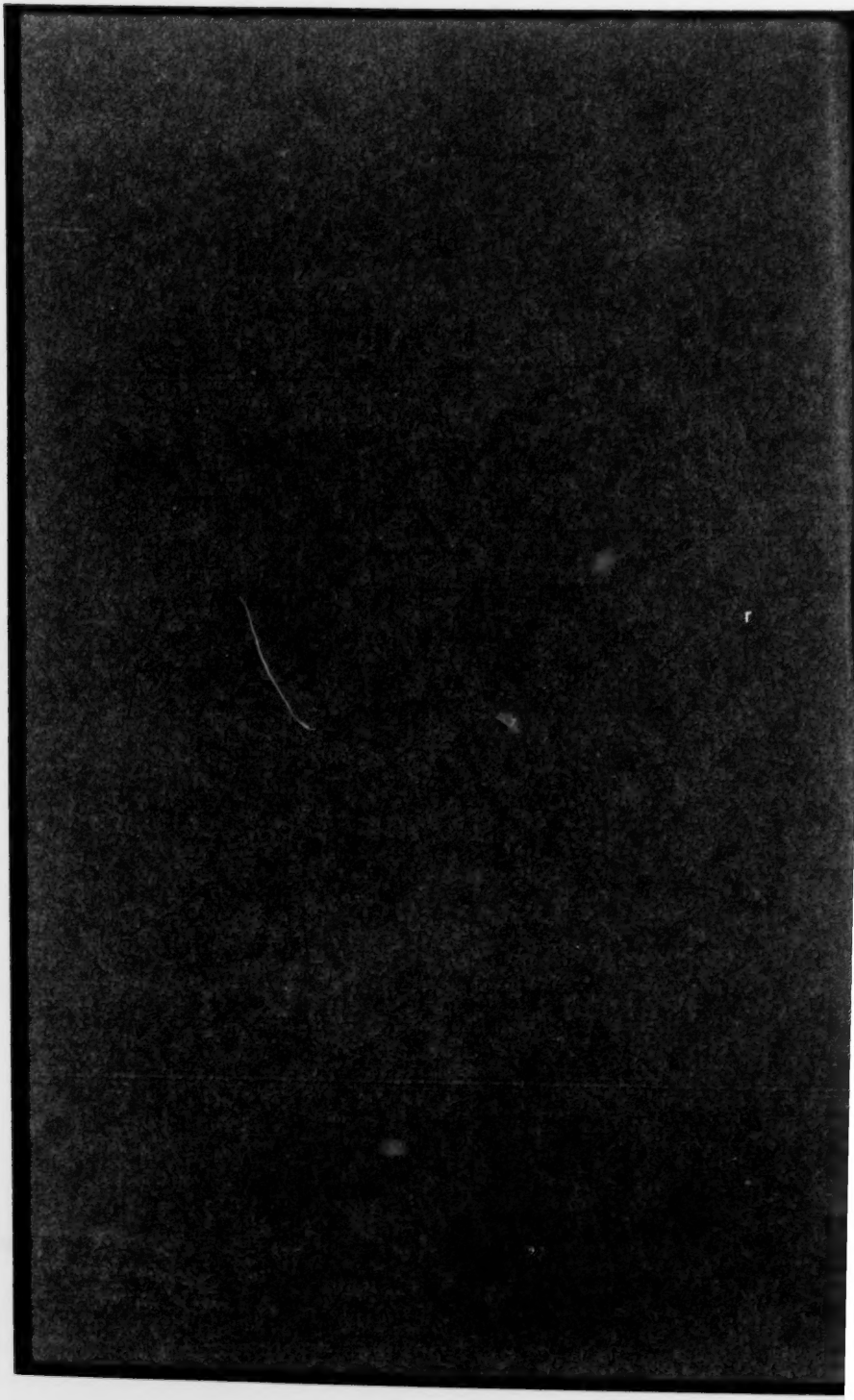
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION



In the Supreme Court of the United States

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

This case is substantially identical with *Tyng* v. *Helvering*,[1] pending upon petition for certiorari,

[1] The two cases were disposed of in a single opinion by the Board of Tax Appeals (36 B. T. A. 21), in a single opinion in the Circuit Court of Appeals (106 F. (2d) 55), and in a single per curiam opinion of this Court (308 U. S. 527). Upon remand by this Court, however, the Circuit Court of Appeals filed a short opinion in the *Tyng* case, which is not reported, but appears at page 405 of the record in that case. It filed no opinion in the instant case, but it is clear that the Circuit Court of Appeals regarded its opinion in the *Tyng* case as applying to the instant case as well. See Pet. 4.

Petitioner here, however, does not make the contention made by Mr. Tyng based upon a collateral exchange of General Gas & Electric stock personally held by him for stock of Associated.

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No. 148, 1940 Term, and we respectfully refer the Court to our brief in opposition in that case for a discussion of the issues involved. For reasons stated therein, we urge that the petition be denied.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

JULY 1940.

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